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No. 05-1342

# In the Supreme Court of the United States

LINDA A. WATTERS, Commissioner, Michigan Office of Insurance and Financial Services,

*Petitioner*,

v.

WACHOVIA BANK, N.A., and WACHOVIA MORTGAGE CORPORATION,

*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the Court of Appeals for the Sixth Circuit correctly held that the Office of the Comptroller of the Currency ("OCC") acted within the bounds of its delegated authority when it determined that the incidental powers of a national bank include the power to carry out the business of banking through operating subsidiaries that are subject to the same terms and conditions, including the exclusive licensing and visitorial authority of the OCC, as the banks themselves?

## CORPORATE DISCLOSURE STATEMENT

Wachovia Bank N.A. and Wachovia Mortgage Corporation state as follows: (1) Wachovia Bank, N.A. is owned by Wachovia Corporation, a financial services holding company publicly traded on the New York Stock Exchange; and (2) Wachovia Mortgage Corporation is owned by Wachovia Bank, N.A.

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## PETITION FOR A WRIT OF CERTIORARI

Respondents, Wachovia Bank, N.A. ("Wachovia Bank") and Wachovia Mortgage Corporation ("Wachovia Mortgage"), respectfully request that this Court deny the petition for a writ of certiorari. In this case, the Sixth Circuit – in accord with every other court to address the issue – held that state attempts to regulate the operating subsidiaries of national banks are preempted by the National Bank Act and OCC regulations. It is not necessary for this Court to review that decision. There is no conflict in the circuits on the questions presented here. The decision does not impair any rights left to the States by the Tenth Amendment. The holding below, which affirmed the reasonableness of a well-considered agency regulation, plainly is correct. The petition for a writ for certiorari accordingly should be denied.

## COUNTER-STATEMENT OF THE CASE

This case concerns the powers of national banks and the authority of their federal regulator, the OCC. Respondents challenged portions of Michigan's real estate lending statutes that regulate Respondents' conduct in three basic areas: (1) conditions for doing business in the State of Michigan, such as registration fees and filing requirements,[1] (2) examination

[1] The specific statutory provisions at issue are part of Michigan's Mortgage Brokers, Lenders, and Servicers Licensing Act, Mich. Comp. Laws § 445.1651 *et seq.*, and the Secondary Mortgage Act, Mich. Comp. Laws § 493.51 *et seq.* Wachovia challenged the provisions that (a) require registration before a mortgage lender may conduct business in Michigan, Mich. Comp. Laws §§ 445.1652(1), 445.1656(1)(d), 445.1679(1)(a), 493.52(1) and 493.53a(d); (b) require payment of fees on initial application for registration or renewals thereafter, Mich. Comp. Laws §§ 445.1658, 445.1657(1), 493.54, and 494.56a(2); (c) require annual financial statements be submitted to the Commissioner and certain documents retained in a particular format, Mich. Comp. Laws §§

and investigations by the state officials, and (3) regulatory actions to enforce these state law requirements. These Michigan statutes directly interfere with Wachovia Bank's ability to conduct banking business through its operating subsidiary, Wachovia Mortgage, and conflict with regulations that the OCC adopted under the National Bank Act ("NBA"). Contrary to Petitioner's assertions, Respondents have never argued for preemption of all state laws affecting national banks, only those that stand as an obstacle to the powers of national banks to conduct the business of banking through operating subsidiaries.

The NBA establishes nationally chartered banks, to which it grants, among other things, "all such incidental powers" that are necessary to conduct the business of banking. 12 U.S.C. § 24 (Seventh). The NBA further provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law." 12 U.S.C. § 484(a). Since 1966, the OCC has recognized that national banks have the incidental power to conduct the business of banking through operating subsidiaries. 31 Fed. Reg. 11,459, 11,459-60 (Aug. 31, 1966).

The OCC has "primary responsibility for surveillance of 'the business of banking' authorized by § 24 Seventh" and has the power to promulgate regulations that define "incidental powers" of national banks. *NationsBank of N.C., N.A. v.*

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445.1657(2), 445.1671, 493.56a(2) and 493.56a(13); (d) place registrants under the "general supervision and control" of the Commissioner with the power to conduct examinations and investigations, Mich. Comp. Laws §§ 445.1661, 493.56b; (e) permit the Commissioner to investigate a complaint from any person if the appropriate federal regulatory authority is not pursuing it "adequately," Mich. Comp. Laws § 445.1663; and (f) allow the Commissioner to take regulatory or other actions based on violations of the foregoing provisions, Mich. Comp. Laws §§ 445.1665, 445.1666, 445.1667, 493.58-59, and 493.62a.

*Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995); 12 U.S.C. § 93a. Pursuant to this authority, the OCC has promulgated regulations providing that:

- the OCC has exclusive visitorial authority over national banks (12 C.F.R. § 7.4000);[2]

- a national bank "may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking" (12 C.F.R. § 5.34(e)(1));

- an operating subsidiary may conduct "activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank" (12 C.F.R. § 5.34(e)(3));

- the standards for real estate lending, as authorized by 12 U.S.C. § 371(a), apply to loans provided by "national banks and their operating subsidiaries" (12 C.F.R. § 34.1);

- a national bank may make real estate loans without regard to specified types of State laws that "obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers" (12 C.F.R. § 34.4); and

- "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank" (12 C.F.R. § 7.4006).

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[2] Visitorial authority" refers to the power to examine a bank, inspect its books and records, regulate and supervise its activities authorized by federal banking law, and enforce compliance with applicable state and federal laws concerning those activities. 12 C.F.R. § 7.4000(a)(2)(i)-(iv).

When the OCC recently revised some of its regulations, it explained that increasing state banking regulations had hindered "national banks' ability to conduct operations to the full extent authorized by Federal law." Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904 (Jan. 13, 2004). The OCC further explained that its responsibility for the "safe and sound operations" of national banks was central to its promulgation of these regulations. *Id.* at 1907.

In the face of this federal framework, the Petitioner, the Commissioner of the Office of Financial and Insurance Services for the State of Michigan, sought to use Michigan's banking statutes to regulate mortgage lenders operating in the state. Respondents challenged Petitioner's exercise, as against operating subsidiaries of national banks, of the regulatory authority purportedly granted in the Michigan statutes, which conflict with the federal regulatory framework described above. Affirming the district court's grant of summary judgment, the Sixth Circuit properly held that the OCC regulations, including section 7.4006, "reflect a consistent and well-reasoned approach to preempting state regulation of operating subsidiaries so as to avoid interference with national banks' exercise of their powers under 12 U.S.C. § 24 (Seventh) and their ability to use operating subsidiaries in the dynamic market of banking and real estate lending." *Watters v. Wachovia Bank N.A.*, 431 F.3d 556, 563 (6th Cir. 2005) (Pet. App. 11a-12a), citing *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 321 (2d Cir. 2005).

## REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner asks this Court to resolve a supposed conflict among the circuits and with this Court's prior decisions, and to address an alleged intrusion on state sovereignty in violation of the Tenth Amendment of the United States Constitution. The Petition should be denied for three primary

reasons. First, there is no conflict among the circuits, or with any prior decisions of this Court, arising from the issues presented. Every court that has considered the question has held that the OCC acted within the bounds of its delegated authority when it determined that the incidental powers of a national bank include the power to carry out the business of banking through operating subsidiaries that are subject to the same terms and conditions, including the exclusive licensing and visitorial authority of the OCC, as the banks themselves. Second, for the reasons set forth in the opinions of the Sixth, Second, and Ninth Circuits, and of the district courts to have considered the issue actually presented here, the decision below is correct. Third, there is no intrusion upon any state right preserved by the Tenth Amendment when Congress exercises its authority granted by the Commerce Clause.

A petition is presently pending in *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005), No. 05-431, which presents a preemption issue substantially identical to the one presented in this case. In *Burke*, the Court invited the Solicitor General to submit the views of the United States. The Solicitor General filed his brief on May 11, 2006.[3] In that brief, the Solicitor General recommended that the petition be denied because there is no conflict among the circuits and the Second Circuit was correct in holding that the OCC's regulations have preemptive effect. Precisely the same conclusion applies here.

### A. The Sixth Circuit Decision Is Consistent With Those Of The Second And Ninth Circuits, And The District Courts That Have Considered The Issue, And The Purported "Conflicts" Identified By Petitioners Do Not Exist.

All courts that have considered the question presented in this case—whether the NBA and OCC regulations preempt

[3] Referred to herein as "Solicitor General's Brief."

state banking laws concerning operating subsidiaries of nationally chartered banks—have decided the issue in the same way the Sixth Circuit did below.

In *Burke*, the Second Circuit held that Congress has not addressed the precise issue in this case, and that the OCC reasonably construed the NBA consistent with its statutory powers. *Burke*, 414 F.3d at 318-321. As a result, the Court concluded that Connecticut banking statutes are preempted by the OCC's rules that generally preempt state regulation of operating subsidiaries.

In the other circuit court decision on this issue, the Ninth Circuit held, in *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 954 (9th Cir. 2005), that the NBA preempts "the California Commissioner of Corporations' ... exercise of investigative and licensing authority over 'operating subsidiaries' of national banks." The court determined that the OCC had authority not only to allow national banks to create operating subsidiaries that perform national bank functions, but also to regulate operating subsidiaries of national banks. The Ninth Circuit held that the OCC's regulations permissibly reserved visitorial power over operating subsidiaries of national banks to the OCC. 419 F.3d at 964.

The *Burke* and *Boutris* opinions were guided by the *Chevron*[4] framework. None of the courts found the plain language of the NBA dispositive. Each therefore held that the OCC's interpretations of the NBA were entitled to deference because of the close relationship between the OCC's substantive policy determinations and its preemption regulation. In other words, "§ 7.4006 is 'a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute.'" *Boutris*, 419 F.3d at 963 (citations omitted). *See also Burke*, 414 F.3d at 321 (regulations "reflect a con-

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[4] *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 328 (1984).

sistent and well-reasoned approach to preempting state regulation ...").

Similarly, the three district courts to have decided the issue presented in this case concluded that the OCC regulations preempt state laws that seek to regulate operating subsidiaries of national banks.[5] *See Office of the Comptroller of the Currency v. Spitzer*, 396 F. Supp.2d 383 (S.D.N.Y. 2005), appeal pending (granting declaratory and injunctive relief to OCC to preclude the New York Attorney General from enforcing certain state banking laws against national banks or their operating subsidiaries, on the ground that the state laws conflict with and are preempted by NBA and OCC's reasonable regulations); *Nat'l City Bank v. Turnbaugh*, 367 F. Supp. 2d 805 (D. Md. 2005), appeal pending (holding that Maryland banking laws purporting to authorize state banking commissioner to exercise licensing and visitorial authority over operating subsidiaries of national banks are preempted by NBA and OCC's regulations); *Wells Fargo Bank, N.A. v. Boutris*, 265 F. Supp. 2d 1162 (E.D. Cal. 2003), *aff'd in part*, 419 F.3d 949 (9th Cir. 2005). No court has decided the issues addressed by the Sixth Circuit below in a contrary manner.

Petitioner attempts to manufacture a "conflict" between the Sixth Circuit's decision and that of the Tenth Circuit in *Colorado Public Utilities Commission v. Harmon*, 951 F.2d 1571, 1578-79 (10th Cir. 1991).[6] In *Harmon*, the court faced

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[5] In addition to these cases, the district courts deciding the *Watters*, *Burke*, and *Boutris* cases all decided in favor of the OCC's authority over the operating subsidiaries of national banks, and were affirmed by the Sixth, Second and Ninth Circuits.

[6] This argument was not made below. This Court does not permit parties to raise new arguments in their petitions for certiorari, and Petitioner's attempt to do just that should be rejected. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 54-56 (2002); *Sisson v. Ruby*, 497 U.S. 358, 359 n.1 (1990).

a regulation that codified the judicially created test for preemption. The court held that, although the substance of the Secretary of Transportation's opinion regarding the subject matter of its regulations was entitled to deference, the court must make its own legal determination of preemption.

The *Harmon* decision flows from this Court's approach in *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 (1996). *Harmon* distinguishes between agency opinions on the substantive meaning of regulations—which are entitled to deference—and agency opinions on the preemptive scope of regulations—which are not. The Sixth Circuit's decision does not implicate *Harmon*, as the court did not defer to the OCC's view on whether its regulations are entitled to preemptive effect. As noted in the Solicitor General's Brief in *Burke*, *Harmon* is distinguishable from this case because "[t]here is no dispute that application of the relevant [state] banking laws to Wachovia Mortgage would conflict directly with the Comptroller's regulations, and the court of appeals did not rely on deference principles in reaching that conclusion." Solicitor General's Brief, p. 20.

Petitioner also misapplies the holding in *Gonzales v. Oregon*, 126 S. Ct. 904 (2006), where the Court rejected an interpretation of the Controlled Substance Act by the Attorney General. (Pet. at 23-24.) The Court concluded that *Chevron* deference did not apply because it found that Congress did not give the Attorney General rulemaking power to declare illegitimate a medical standard for care and treatment of patients. 126 S. Ct. at 916-17. In contrast, this Court has held that the OCC *does* have primary authority to define the scope of "incidental powers" that are "necessary" for a national bank "to carry on the business of banking." *Nationsbank*, 513 U.S. at 256, 258-260, 264. The OCC appropriately exercised that authority here.

Similarly, in *American Bar Association v. Federal Trade Commission*, 430 F.3d 457 (D.C. Cir. 2005), also cited by

Petitioner as a "conflict," the Court rejected a contention that *Chevron* applies any time a statute does not expressly negate the existence of a claimed administrative power. (Pet. at 24-25.) However, neither Respondents nor the Sixth Circuit relied on a negative inference to find OCC rulemaking authority over a national bank and its incidental powers. Rather, as in *Nationsbank*, the Sixth Circuit relied on the express statutory language granting such authority to the OCC.

Because the Sixth Circuit below did not, as Petitioner suggests, decide the propriety of deferring to a purely legal interpretation of the preemptive scope of the statute or regulation at issue, nor step outside the statutory footprint for the OCC's rulemaking authority, the cases Petitioner cites as inconsistent do not, in fact, conflict with the decision below. Accordingly, the split among the courts of appeals that Petitioner asserts does not exist.

### B. The Sixth Circuit Properly Concluded That The National Bank Act And OCC Regulations Preempt State Law.

#### *1. The NBA Is Silent Regarding The Use Of Operating Subsidiaries, And Thus Chevron Deference Is Properly Invoked.*

In contending that the decision below is wrong, Petitioner's principal argument is that the OCC overreached its authority because the agency redefined the term "national bank." Pet. at 8-13. The Solicitor General's Brief in *Burke* addressed this argument succinctly:

> [I]n establishing that state laws – including the exercise of state visitorial powers – may be applied to an operating subsidiary only to the same extent as to the parent national bank, the OCC did not purport to interpret the term "national bank" in Section 484(a) to include an operating subsidiary. ... Rather, the OCC construed the term "incidental powers," in 12

> U.S.C. 24 Seventh, to encompass the conduct of activities through an operating subsidiary. A straightforward incident of authorizing a national bank to conduct its activities through an operating subsidiary is that the subsidiary should no more be constrained by state law (including state laws concerning visitation) than the parent bank. Accordingly, Section 24 Seventh, coupled with Section 484(a), "provides the OCC with ample authority to preempt states from exercising visitorial power over the subsidiary because such regulation could interfere with the national bank's exercise of its federal powers."

Solicitor General's Brief, p. 15.

Petitioner also asserts that the NBA is not ambiguous or silent regarding operating subsidiaries.[7] She bases this strained position on the simple fact that § 484's limits on visitorial powers do not mention "affiliates" of national banks. (Pet. at 9-10, 12-14.) Petitioner concludes that the absence of "affiliates" in the language of § 484 is evidence that Congress intended to limit the visitorial powers of § 484 to national banks themselves. (Pet. at 13.) This argument combines a fragmented view of the OCC's authority with an entirely unwarranted inference of intent from a Civil War-era statute.

The text of 12 U.S.C. § 484 is not the sole determinant of the OCC's authority over national banks and their operating subsidiaries. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 121, 133 (2000) (emphasizing the need

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[7] This is the opposite position of that taken by Petitioner before the district court, where Petitioner admitted that the statute is ambiguous. Before the Sixth Circuit, Petitioner argued that the district court erred by following her counsel's "suggestion" that the statute is ambiguous.

to be "guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision ... to an administrative agency," and stressing the importance of considering statutory language, not in isolation, but in context). Indeed, the NBA granted the OCC not only exclusive visitorial authority over national banks but also the responsibility to define and administer the incidental powers of national banks. Petitioner fails to cite to any statutory language in which Congress spoke to "the precise question" of how federal law affects state laws when a national bank, exercising its incidental powers under § 24, uses an operating subsidiary to engage in mortgage lending. *See Chevron*, 467 U.S. at 842-43 (holding that when Congress has not addressed "the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation") (footnote omitted). As "the administrator charged with supervision of the National Bank Act," *NationsBank*, 513 U.S. at 256, the OCC has ample authority to declare whether national banks may use operating subsidiaries to engage in mortgage lending and to determine the regulatory consequences of these efforts. No court that has considered the question has accepted the Petitioner's argument that the NBA's language is dispositive.

In this instance, deferral to the OCC is especially warranted because it is obvious that congressional silence in §§ 221a(b) and 484 about operating subsidiaries signifies not intent but unawareness. Congress first enacted § 484 in 1864, Rev. Stat. § 5240, derived from Act June 3, 1864, ch. 106, 13 Stat. 99 (codified as amended at 12 U.S.C. § 484), and § 221a in 1933, June 16, 1933, ch. 89, § 2, 48 Stat. 162 (codified as amended at 12 U.S.C. § 221a). The practice of using operating subsidiaries to conduct the business of banking – as opposed to using separate corporate affiliates for non-banking business – was first recognized decades later, in the 1960s.

Petitioner also argues that by not adding a reference to operating subsidiaries or "affiliates" to § 484 in 1982 and 1983 when the statute was amended, Congress was indicating that it did not believe that section covered operating subsidiaries. (Pet. at 13-14.) The Sixth Circuit, like the Second and Ninth before it, rejected this argument, stating:

> The statutes cited that include the term "affiliate" – section 161(c), section 371c, section 371c-I, and section 481 – establish the duties of a national bank to report on the activities of its affiliates and the bank's relationship with its affiliates. In order to be comprehensible, the statues must mention "affiliates." This does not mean, however, that any statute that does not mention "affiliates" reflects the unambiguous intent of Congress to exclude them from the provision. If anything, it indicates that Congress has only included reference to affiliates in the limited cases where they must be distinguished from national banks. Michigan and amici have pointed to no statutory sections that do not specifically pertain to the relationship between national banks and their affiliates that contain the term "affiliates" or "operating subsidiaries."

*Watters*, 431 F.3d at 562 (Pet. App. 10a). *See also Burke*, 414 F.3d at 317-18, *Boutris*, 419 F.3d at 959 n.12, and Solicitor General's Brief, p. 15 n.8.

The evolution of the incidental powers of national banks to engage in the business of banking, as recognized by the OCC, created the operating subsidiary. Through 12 C.F.R. §§ 5.34 and 7.4006, the OCC has incorporated the relatively new operating subsidiary into the National Bank Act's regulatory scheme. In so doing, the OCC has performed a fundamental agency function: it has interpreted policies found in the NBA that are unclear in their application to operating subsidiaries and has interpreted "the meaning [and] reach" of

certain provisions of the NBA under circumstances that require a "full understanding of the force of the statutory policy in the given situation." *See Chevron*, 467 U.S. at 844-45. Under these circumstances, the OCC's interpretation must be accorded great deference. *Smiley*, 517 U.S. at 739; *NationsBank*, 513 U.S. at 256. Accordingly, the Sixth Circuit correctly recognized that Congressional silence in this instance leads to deference under *Chevron*, rather than a negative inference that Congress intentionally omitted operating subsidiaries from the scope of the OCC's exclusive visitorial authority.

### 2. *The Sixth Circuit's Preemption Analysis Was Proper.*

Petitioner also argues that Congress did not expressly state that it intended to preempt state law, and that absent such express statutory preemption, the "traditional" presumption against preemption must apply. (Pet. at 16.) However, as this Court held in *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law." 458 U.S. 141, 154 (1982). Indeed, Petitioner's demand for explicit evidence of congressional intent to preempt despite the OCC's regulations reflects precisely the kind of "narrow focus on Congress' intent to supersede state law" that this Court found to be "misdirected" in *de la Cuesta*. *Id.*

The holding in *de la Cuesta* concerned the enforceability of "due on sales" clauses, which allow a mortgage lender to accelerate a promissory note if the mortgaged property is sold or transferred without the lender's permission. 458 U.S. at 144-45. The Federal Home Loan Bank Board, the predecessor to the Office of Thrift Supervision, adopted regulations permitting federal savings and loan associations to use "due on sale" clauses. *Id.* California, however, by statute and judicial precedent, generally considered these clauses unenforceable. *Id.* at 148-49. Finding no express Congres-

sional intent to preempt and relying on the strong local interest in real estate, the California Court of Appeals upheld the California law over claims of preemption. *Id.* at 150-53. This Court reversed, eschewing as "misdirected" a narrow search for express Congressional intent to preempt, and applied a different standard: "[w]here Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily." *Id.* at 153-54 (citing *United States v. Shimer*, 367 U.S. 374, 381-82 (1961)); *see Lynnbrook Farms v. Smithkline Beecham Corp.*, 79 F.3d 620, 623-24 (7th Cir.), *cert. denied*, 519 U.S. 867 (1996) ("In ascertaining whether an agency has acted properly in preempting state law, it is significant to note that an express Congressional authorization to displace state law in the delegating statute is unnecessary") (citing and explaining *de la Cuesta*).[8]

After *de la Cuesta*, the real issue is not whether Congress specifically intended to preempt, but instead whether the agency was authorized to issue the preemptive regulation. Here, there can be no doubt about that. The OCC's authority to administer and interpret the NBA is well established. *See, e.g., NationsBank*, 513 U.S. at 256-57 (quoting precedent and concluding that "[t]he Comptroller of the Currency is charged with the enforcement of banking laws to an extent

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[8] *See also* Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 26-27 (Jan. 1983) ("[U]nless one is prepared to rethink fundamentally the role of public administration in our constitutional order, article III, standing alone, is not violated by judicial deference to administrative construction of law. Enforcement of other constitutional restrictions aside, the only judicial task is to determine what statutory authority has been conferred upon the administrative agency. Once it has done so, the court has discharged its duty to say what the law is. This is no novel perception.") (footnotes omitted).

that warrants the invocation of [the rule of deference] with respect to his deliberative conclusions as to the meaning of these laws." (internal quotation marks omitted); *see also United States v. Mead Corp.*, 533 U.S. 218, 231 n. 13 (2001) (noting the high degree of deference accorded the Comptroller's interpretation of the National Bank Act). The OCC's "determination as to what activities are authorized under the National Bank Act should be sustained if reasonable." *First Nat'l Bank of Eastern Ark. v. Taylor*, 907 F.2d 775, 777-78 (8th Cir.), *cert. denied*, 498 U.S. 972 (1990) (*citing Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 406, 409 (1987)). Each of the regulations at issue in this appeal falls well within the OCC's authority. *See also* Solicitor General's Brief, p. 11.

In adopting 12 C.F.R. § 5.34, the OCC determined that the incidental powers that Congress granted to national banks in 12 U.S.C. § 24 (Seventh) include the authority to use operating subsidiaries to conduct banking business. In *NationsBank*, this Court held that the Comptroller has discretion to authorize national banks to engage in activities beyond those "specifically enumerated" in § 24 (Seventh). *NationsBank*, 513 U.S. at 258 n.2. In essence, the Court agreed with the OCC's construction of § 24 Seventh's authorization of "incidental powers ... necessary to carry on the business of banking" as "an independent grant of authority" beyond the other specific powers set forth in § 24 (Seventh). *Id.* at 257-58. The Court also confirmed that the Comptroller has broad authority to prescribe the incidental powers of national banks, provided that the powers are within the reasonable bounds of activities connected with banking. *Id.* at 258 n.2. The Court then held that the OCC "reasonably concluded that the authority to sell annuities qualifies as part of, or incidental to, the business of banking." *Id.* at 258. Certainly, using an operating subsidiary to offer mortgage loans likewise falls within the reasonable bounds of "banking." *See* 12 U.S.C. § 371(a); 12 C.F.R. § 34.1; Solicitor General's Brief, pp. 16-17.

Moreover, 12 C.F.R. § 7.4000(a), which provides that the OCC alone may visit national banks, is entirely consistent with 12 U.S.C. § 484, which expressly bars states from exercising visitorial powers over national banks (subject to limited exceptions not applicable here). *See* 12 U.S.C. § 484(b). This statute entrusts the OCC with the responsibility to examine national banks' compliance with federal and applicable state law. *See* Interpretive Letter No. 614, [1992-1993 Transfer Binder] Fed. Banking L. Rep. ¶ 83,454 (Jan. 15, 1993); *Nat'l State Bank v. Long*, 630 F.2d 981 (3rd Cir. 1980) (holding that the OCC, rather than the state banking commissioner, was authorized under § 484 to enforce a state law against a national bank); *First Union Nat'l Bank v. Burke*, 48 F. Supp. 2d 132, 145-46 (D. Conn. 1999) (rejecting state commissioner's authority to conduct administrative enforcement proceedings against national banks and confirming the OCC's exclusive authority over such proceedings).[9]

Likewise, 12 C.F.R. § 7.4006, which addresses the extent to which state laws apply to operating subsidiaries of national banks, finds solid support in the power of national banks to use operating subsidiaries for banking business and the preemptive force of federal statutes and regulations. Indeed, in

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[9] In *First Union*, Judge Arterton flatly rejected the Commissioner's argument that *Long* was an "aberration." *First Union Nat'l Bank v. Burke*, 48 F. Supp. 2d 132, 145-46 (D. Conn. 1999). More recently, the Third Circuit invoked *Long* to support its conclusion that the OCC, "the primary regulator of national banks pursuant to authority granted by the National Bank Act," had authority to regulate the activities of a national bank and its operating subsidiary with regard to soliciting potential credit card members. *Roberts v. Fleet Bank (R.I.), N.A.*, 342 F.3d 260, 269-70 & n. 5 (3d Cir. 2003); *see also Wells Fargo Bank of Tex., N.A. v. James*, 321 F.3d 488, 490 (5th Cir. 2003) ("The Office of the Comptroller of the Currency (OCC) is the agency empowered by the NBA to supervise and regulate federally chartered banks in accordance with the broad substantive provisions of the NBA.").

adopting this regulation after due notice and comment, the OCC noted that "operating subsidiaries are, in essence, incorporated departments or divisions of the bank and, accordingly, should not be treated differently than their parent banks under State laws." 66 Fed. Reg. 34,784, 34,788 (July 2, 2001).

### *3. Petitioner's Consumer Protection Arguments Do Not Make The Sixth Circuit's Preemption Finding Erroneous.*

Petitioner argues at considerable length that Michigan's statutes should not be preempted because the regulation of operating subsidiaries allows Petitioner to "protect consumers from unfair, unsound, and abusive lending practices," and that "[t]he regulation of operating subsidiaries ... is a matter of vital importance to states." (Pet. at 4, 28-29.) As an initial matter, Petitioner is incorrect in arguing that consumers will be left without protection if the Michigan laws at issue here are preempted, as the OCC continues in this role. In *WFS Financial*, the court dismissed this same argument:

> To read defendants' brief, one might think that the scheme envisioned by the Office of Thrift Supervision is nothing but a ploy to permit corporate subsidiaries of federal savings and loan associations to bilk the public with impunity, free from all laws and regulation, while giving the parent complete protection from any liability resulting from the actions of its unregulated offspring. The truth is that the subsidiary is exempt from only those laws and regulations that preemption principles would bar the state from applying to the savings and loan association that engaged in the same acts. It cannot exist as an operating subsidiary without the prior approval of the Office of Thrift Supervision. It is not exempt from federal laws and regulations that govern loans, consumer loan disclosures, loan fees and interest

> rates, any more than its parent is. Furthermore, it is subject to the same kind of regulation and monitoring as its parent to insure that it is operated in a way that will maintain the viability of its parent and the solvency of the federal deposit insurance system. See 12 U.S.C. § 1828m.

*WFS Fin.*, 79 F. Supp. 2d at 1028; *see also Nat'l State Bank v. Long*, 630 F.2d 981 (3rd Cir. 1980) (holding that the OCC had exclusive enforcement authority over national banks).

Moreover, Petitioner's plea is misdirected. As this Court made clear in *Franklin National Bank v. New York*, 347 U.S. 373 (1954), courts do not weigh relative merits of state laws that conflict with federal authority. *Franklin National* concerned a New York statute that was purportedly designed to protect consumers. The New York law prohibited Franklin National and other commercial banks from using the word "saving" or "savings" in advertisements to avoid the possibility that consumers would confuse these banks with state-chartered mutual savings banks. *Id.* at 374. This Court refused to consider the merits of the state statute or to be swayed by a special local interest that New York claimed in this legislation:

> There appears to be a clear conflict between the law of New York and the law of the Federal Government. **We cannot resolve conflicts of authority by our judgment as to the wisdom or need of either conflicting policy. The compact between the states creating the Federal Government resolves them as a matter of supremacy. However wise or needful New York's policy, a matter as to which we express no judgment, it must give way to the contrary federal policy.**

*Id.* at 378-79 (emphasis added; footnotes omitted). Accordingly, in addition to her failure to recognize the role of the OCC, Petitioner attempts to distort the Court's function by

invoking "consumer protection" and "local interest" in hopes of avoiding conflict preemption.

In fact, the Court consistently has applied the understanding that "'[t]he relative importance to the State of its own law is not material when there is a conflict with valid federal law, for the Framers of our Constitution provided that the federal law must prevail.'" *de la Cuesta*, 458 U.S. at 153 (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)). As the Court has held, courts "cannot resolve conflicts of authority by our judgment as to the wisdom or need of either conflicting policy. The compact between the states creating the Federal Government resolves them as a matter of supremacy. However wise or needful [a state's policy], ... it must give way to the contrary federal policy." *Watters*, 431 F.3d at 563 (Pet. App. 12a), citing *Franklin Nat'l Bank*. Indeed, even where the state has a "compelling interest" in preservation of its law, "under the Supremacy Clause, from which our preemption doctrine is derived, any state law, ... clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (plurality opinion) (internal quotation marks and citations omitted).

In a similar argument, Petitioner attacks the OCC regulations and interpretative letters by noting that states have a strong interest in "protecting" customers from the operations of national banks within their jurisdiction. (Pet. at 17-18) (quoting House-Senate Conf. Comm. Report on Riegle-Neal Interstate Banking Act, H.R. Rep. 103-651, at 53, reprinted in 1994 U.S. Code Cong. & Admin. News 2068, 2074.) As *Franklin National* made clear, however, this "local interest," whatever its merits, does not outweigh the Supremacy Clause. *Franklin National*, 347 U.S. at 378-79. Additionally, the comments of some legislators during debates over Riegle-Neal do not displace the OCC's authority over national banks and its ability to determine the preemptive scope of the National Bank Act and federal regulations. Indeed,

when rejecting the same argument, the district court in *Burke* aptly pointed out that, notwithstanding aspects of the debate, Congress adopted a statute that affords exclusive enforcement authority to the OCC:

> Although the legislative history of the Riegle Neal Interstate Banking Act contains some Congressional expression of concern that the OCC historically may have been too willing to find state laws preempted and not enforceable, Congress granted the OCC exclusive enforcement authority over interstate branches' compliance with state banking laws and required it to maintain a report of its preemption determinations for Congressional review under 12 U.S.C. § 36(f)(C).

*First Union N.A. v. Burke*, 48 F. Supp. 2d at 146 (footnote omitted).

Also unpersuasive is Petitioner's challenge to the OCC's visitorial authority based on a string of older decisions of this Court. (Pet. at 18-19) (citing *McClellan v. Chipman*, 164 U.S. 347 (1896); *Davis v. Elmira Savings Bank*, 161 U.S. 275 (1896); *First Nat'l Bank v. Missouri*, 263 U.S. 640 (1924); *Wichita Royalty Co. v. City Nat'l Bank*, 306 U.S. 103 (1939); *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233 (1944)). Petitioner fails to acknowledge that only one of these decisions considers the visitorial authority of the OCC in any depth, and none cites to § 484.[10] Moreover, cases such as *McClellan* dealt with state laws that were not expressly preempted and had only an incidental effect on na-

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[10] Indeed, almost all of these are civil cases that are entirely irrelevant to the attempted exercise of regulatory authority by a state sovereign. The only case involving a dispute over banking laws between a national bank and a state, *First National Bank v. Missouri*, 263 U.S. 640 (1924), has since been superseded by the McFadden Act, 12 U.S.C. § 36(c).

tional banks, unlike this case, where there is express preemption and conflict preemption under the NBA.

### C. Preemption Here Does Not Violate The Tenth Amendment Of The United States Constitution.

Petitioner contends that preemption by the OCC violates the State of Michigan's sovereignty under the Tenth Amendment. U.S. CONST. AMEND X. There is no merit to this argument, and it does not justify granting the petition.

The Tenth Amendment states, in relevant part, that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People." It can hardly be doubted that the Constitution authorizes Congress to establish national banks. *See McCulloch v. Maryland*, 17 U.S. 316, 424-25 (1819). *See also Clark v. United States*, 184 F.2d 952, 954 (10th Cir. 1950), *cert. denied*, 340 U.S. 955 (1951) ("Congress has the power to enact legislation for the protection, preservation and regulation of [national banks]"). Those courts that have considered whether the Tenth Amendment precludes the OCC from exercising exclusive authority over national banks and/or their operating subsidiaries therefore have rejected the contention. *See e.g.*, *First Union Nat'l Bank v. Burke*, 48 F. Supp.2d 132, 148 (D. Conn. 1999). *See also Wells Fargo*, 265 F. Supp. 2d at 1170-71 (citing *First Union Nat'l Bank* with approval); and *Nat'l City Bank of Indiana v. Boutris*, 2003 WL 21536818, *3 (E.D. Ca. 2003).

That conclusion is consistent with this Court's recognition that lending activities by national banks have a broad impact on the national economy, and therefore are covered by the Commerce Clause. *U.S. Bank v. Alafabco, Inc.*, 539 U.S. 52, 58 (2003). Indeed, since there is clearly a rational basis to conclude that the regulated activity at issue here affects interstate commerce, the exercise of federal power is

valid under the Commerce Clause. *United States v. Lopez*, 514 U.S. 549, 557 (1995).

Petitioner's reliance on *Solid Waste Agency of Northern Cook County v. United States Army Corp of Engineers*, 531 U.S. 159 (2001) is misplaced. In that case, the Court found that the statute was clear, so no administrative deference was appropriate. It also found that the administrative interpretation at issue "invokes the outer limits of Congress' power" (*id.* at 172), a dramatically different situation than the one presented here, dealing with the long-standing recognition of federal authority under the Commerce Clause with respect to banking matters.

The underlying premise of Petitioner's argument is that the states have a constitutional right to monitor and regulate the activities of companies that are incorporated under state law. But the OCC has not converted state-chartered corporations into nationally chartered corporations. Instead, federal law and regulations simply preempt the exercise of certain state authority over particular types of corporations. This type of regulation raises no Tenth Amendment issues.

Finally, the case of *Hopkins Federal Savings & Loan Ass'n v. Cleary*, 296 U.S. 315 (1935), cited by Petitioner as holding that the Tenth Amendment was violated by a provision of the Federal Home Owners' Loan Act, did not involve a situation "where the central government is at liberty (as it is under the commerce clause when such a purpose is disclosed) to exercise a power that is exclusive as well as paramount." *Id.* at 337. In contrast, this case does involve a statute where Congress has expressly stated the national interest in the regulation of national banks is paramount.

As a result, the Sixth Circuit properly held that the exercise of federal power is appropriate and not barred by the Tenth Amendment.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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